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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

MILENA SHIP MANAGEMENT COMPANY, LTD.,
SOUTH CROSS SHIPPING, LTD.,
SOUTH ADRIATIC BULK SHIPPING LIMITED, AND
GULF & EASTERN STEAMSHIP AND CHARTERING CORP.,
Petitioners,

v.

R. RICHARD NEWCOMB, DIRECTOR,
OFFICE OF FOREIGN ASSETS CONTROL OF THE
DEPARTMENT OF THE TREASURY, AND
JAMES MURRAY, SENIOR SPECIAL AGENT,
UNITED STATES CUSTOMS SERVICE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONERS' REPLY BRIEF

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
PREFACE	1
I. OFAC HAD NO PRIOR "KNOWLEDGE" TO JUSTIFY ITS UNLAWFUL BLOCKING ORDERS AND PRESUMPTION OF GOVERNMENT OWNERSHIP	2
II. OFAC CANNOT "REMEDY" ITS UNLAWFUL BLOCKING ORDERS AFTER THE FACT	4
III. PETITIONERS' CLAIMS ARE NOT MOOT	6
CONCLUSION	8

TABLE OF AUTHORITIES

CASES — Page

Bradley v. School Board of City of Richmond, 416 U.S. 696 (1974) 7
Camp v. Pitts, 411 U.S. 138 (1973) 5
Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) 2, 3, 5, 6, 8
Collins v. Youngblood, 497 U.S. 37 (1990) 8
Florida Power & Light Co. v. Lorion, 470 U.S. 729 (1985) 4, 5, 6
Greene v. United States, 376 U.S. 149 (1964) 7
Miller v. Florida, 482 U.S. 423 (1987) 8
Nixon v. Administrator of General Services, 433 U.S. 425 (1977) 8
Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) 7
Pension Benefit Guaranty Corp. v. LTV Corp., 496 U.S. 633 (1990) 5
Peters v. Hobby, 349 U.S. 331 (1955) 7
Thorpe v. Housing Authority of City of Durham, 393 U.S. 268 (1969) 7
United States v. Brown, 381 U.S. 437 (1965) 8

STATUTES/RULES/PROVISIONS

5 U.S.C. §§ 701-706 ..... 2, 3, 5
50 U.S.C. § 1705(b) 7
50 U.S.C. §§ 1701-1706 8
58 Fed. Reg. 13,199, 13,212 (1993) (§ 585.701 of Federal Republic of Yugoslavia (Serbia and Montenegro) Sanctions Regulations) 7
58 Fed. Reg. 25,771 (1993) (Executive Order No. 12,846) 2, 6, 7, 8
U.S. Const. Art. I, § 9, cl. 3 7
Rule 10.1(a) and (c), Supreme Court of the United States 8

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PETITIONERS' REPLY BRIEF

PREFACE

Respondents advance essentially three main arguments in opposition to the petition for a writ of certiorari. First, OFAC claims that it possessed prior "knowledge" of Yugoslav history and law and relied on it to adopt a "reasonable" presumption that the Yugoslav Government

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[1] Petitioners' list of interested persons and Rule 29.1 notation are set forth at page ii of their petition. Those listings remain current, and no amendment is necessary.

owned or controlled every entity in its territory (Opposition Brief, pp. 3, 7). Second, OFAC contends that even if its administrative record failed to support its initial blocking orders, the agency's subsequent decision rejecting petitioners' application for unblocking the vessels "remedied" any inadequacy in the record (p. 8). Third, OFAC asserts that Executive Order No. 12,846, 58 Fed. Reg. 25,771, which President Clinton signed on April 25, 1993 after the final agency actions in this case, blocks the property of all Yugoslav entities regardless of their affiliation to the Yugoslav Government and effectively moots the writ petition (p. 11).

Denying certiorari in favor of respondents' arguments would directly conflict with the rules governing the conduct of administrative agencies review as set forth in the Administrative Procedure Act, 5 U.S.C. §§ 701-706, and this Court's opinion in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971). No statutory or judicial authority permits an administrator to take unlawful final action and then to justify it after the fact through the arguments of counsel. None of respondents' arguments undermines the need to grant the writ application in this case. To the contrary, the opposition brief underscores the reasons why this Court should grant certiorari to address the important questions concerning due process, separation of powers, and proper standards of judicial review that this petition raises.

I. OFAC HAD NO PRIOR "KNOWLEDGE" TO JUSTIFY ITS UNLAWFUL BLOCKING ORDERS AND PRESUMPTION OF GOVERNMENT OWNERSHIP

Throughout its brief in opposition, OFAC asserts that it based its presumption of government ownership on its prior "knowledge" of the Yugoslav regime's involvement in business enterprises (p. 3) and that its presumption of government ownership was "reasonable" in view of that "history" and its "knowledge of prior Yugoslav law"

(p. 7). Unfortunately for OFAC, no evidence in the administrative or judicial record supports that assertion.

In the "Stipulation and Order" entered in the district court on October 2, 1992, OFAC conceded that it had no "additional evidence to offer beyond that which is already in the Court's record of this proceeding" (Petitioners' Appendix, 44a-45a). As petitioners have established, OFAC's administrative record begins over two weeks *after* it took final agency action by seizing the ZETA on June 19, 1992. OFAC's record contains absolutely no documentation indicating that OFAC had any "knowledge" of the Yugoslav economy, JOP's structure, or Yugoslav or Montenegrin law before OFAC took action by blocking the vessels.

In *Overton Park*, cited above, this Court created a rule of law to control administrative agencies who possess the power to take action that may result in the loss of property, such as in this case. This Court recognized an agency's latitude, but held that a reviewing court under the Administrative Procedure Act must set aside the agency's action "if it was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law' or if the action failed to meet statutory, procedural, or constitutional requirements." 401 U.S. at 414-15. In judging whether the administrator acted within the scope of his authority and if the action was justifiable under these standards, the reviewing court looks to the evidence in the administrative record that was before the administrator at the time of the decisive action, not afterward. 401 U.S. at 419-20. The self-interest of the agency and its attorneys in justifying prior conduct by arguments after the fact led this Court in *Overton Park* to prohibit any post hoc rationalizations. Petitioners submit that this Court had cases precisely like this one in mind.

As the rationale for his agency's action in this case, R. Richard Newcomb, OFAC's director, filed a post hoc affidavit in the district court on August 3, 1992 averring

that he had "knowledge of the Yugoslav economy" and had based his presumption on a "review of the historical structure of the Yugoslav economy and the privatization process begun in SFRY in 1989." Yet, he admittedly relied on the article by Branko Vukmir, which plaintiffs' expert on Yugoslav law, Stephen B. Ives, Jr. furnished to OFAC in late July 1992, over a month *after* OFAC had seized the vessels and after petitioners had sought administrative review. In short, the record plainly shows that OFAC acquired its so-called "knowledge" long after the fact. Paradoxically, when confronted with the U.S. Treasury Department's own opinion that the Yugoslav State does not own "socially-owned" industry in Yugoslavia, OFAC eschews its allegedly prior "knowledge" and relies on "current Yugoslav law" to argue that the Government has "a direct financial interest in the 'social capital' of Yugoslav business enterprises" (Opposition Brief, p. 7 n.1).

OFAC's administrative record plainly shows that OFAC had no prior knowledge to justify its unlawful blocking orders. Only after judicial proceedings began did OFAC begin to cover its tracks by creating self-contradictory conclusions to support its so-called "reasonable presumption. OFAC blocked the vessels on the whim, caprice, and prejudice of its director, who felt the need to act, without an investigation or even a simple meeting with the State Department to support its final agency action. This case cries out for this Court's review to prohibit such gross abuses of administrative power in this and future cases.

II. OFAC CANNOT "REMEDY" ITS UNLAWFUL BLOCKING ORDERS AFTER THE FACT

OFAC erroneously relies on *Florida Power & Light Co. v. Lorion*, 470 U.S. 729 (1985), to argue that the agency's administrative decision of September 18, 1992 denying petitioners' application for unblocking of the vessels somehow "remedied" any assumed "inadequacy" in

the administrative record when OFAC initially blocked the vessels (Opposition Brief, p. 8). OFAC has misconstrued this Court's opinion in the *Florida Power* case and is advancing an argument that is directly contrary to this Court's standards of judicial review under the Administrative Procedure Act, 5 U.S.C. §§ 701-706.

In *Overton Park*, this Court held that judicial review of an administrative action must be based "on the full administrative record that was before the [administrative officer] . . . *at the time he made his decision*." 401 U.S. at 420 (emphasis added). This Court rejected affidavits, legal arguments, and other post hoc rationalizations to justify prior administrative action that lacks support in the administrative record. 401 U.S. at 419. The *Florida Power* decision does not give OFAC license to "paper over" its mistakes, concoct post hoc rationalizations for its earlier, final blocking orders, or engage in a "ping pong" game of remand until the agency "cures" its arbitrary action and prevails. *Overton Park* and *Florida Power* simply establish that a remand to the agency may be proper "for a fuller explanation of the agency's reasoning *at the time of the agency action*" and that the agency must give the reviewing court a full record "to provide an explanation that will enable the court to evaluate the agency's rationale *at the time of decision*." *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 654 (1990) (emphasis added). As this Court stated in *Florida Power*, "[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." 470 U.S. at 743, *quoting Camp v. Pitts*, 411 U.S. 138, 142 (1973). As noted earlier, OFAC has stipulated in this case that it has "no additional evidence to offer" (Petitioners' Appendix, 44a-45a).

OFAC does not dispute the lower courts' findings that it took "final agency action" in blocking the vessels beginning in mid-June 1992. The local point of that final

agency action is the administrative record, such as it existed, when OFAC blocked the vessels. *Overton Park* and *Florida Power* do not permit OFAC to invent a new administrative record or to justify the prior blocking orders through a subsequent administrative decision refusing to unblock the vessels months later. The initial blocking orders must stand or fall on their own merits as of the time OFAC imposed them. The administrative and judicial records in this case plainly show that OFAC adopted its unreasonable and arbitrary presumption on an empty record without any prior investigation or consultation with the State Department or any experts in Yugoslav and Montenegrin law. No decision of this Court permits an administrative agency to act first and justify it later with post hoc rationalizations when challenged. The error that this case presents will undoubtedly recur whenever OFAC purports to implement future economic sanctions against foreign governments and harms the rights of innocent parties in the process. Injustices will result and evade review unless this Court gives guidance to OFAC and the federal courts.

III. PETITIONERS' CLAIMS ARE NOT MOOT

On April 25, 1993, while the appeal of this case was pending in the Fifth Circuit, President Clinton signed Executive Order No. 12,846, 58 Fed. Reg. 25,771, blocking the property of "all commercial, industrial, or public utility undertakings or entities organized or located in the Federal Republic of Yugoslavia (Serbia and Montenegro) . . . ." This executive order further provides that all expenses incident to the blocking and maintenance of property blocked under it and earlier executive orders are chargeable to the owners or operators of the property. Respondents now argue that this new executive order moots petitioners' claims and makes further review of this case "unwarranted." (Opposition Brief, p. 11.) That argument is meritless, because OFAC cannot rely on a later executive order to excuse its earlier final agency action beyond the scope of previous executive orders,

especially where "substantial rights affecting the lives and property of citizens are at stake." *See Peters v. Hobby,* 349 U.S. 331, 347 (1955).

The general rule that a court applies the law in effect at the time of its decision is subject to a very important exception. A court cannot apply new law retroactively to a pending case if a "manifest injustice" would result. *See Bradley v. School Board of City of Richmond,* 416 U.S. 696, 716-17 (1974), *citing Thorpe v. Housing Authority of City of Durham,* 393 U.S. 268, 282 (1969); *Greene v. United States,* 376 U.S. 149, 160 (1964). "If the citizen is to be punished for the crime of violating a legislative order of an executive officer, or of a board or commission, due process of law requires that it shall appear that the order is within the authority of the officer, board or commission, and, if that authority depends on determinations of fact, those determinations must be shown." *Panama Refining Co. v. Ryan,* 293 U.S. 388, 432 (1935).

Respondents cannot rely on Executive Order No. 12,846 of April 25, 1993 retroactively to moot this writ application and sanction the unwarranted seizure of petitioners' vessels almost a year earlier under different executive orders. Petitioners had Fifth Amendment rights to the full economic use of their vessels until OFAC arbitrarily, capriciously, and unlawfully deprived them of those rights by blocking the vessels in mid-June 1992. Since the blocking, petitioners have incurred the substantial costs of maintaining these vessels without any benefit. Applying the latest executive order to moot this writ application would condone OFAC's unlawful actions and deprive petitioners of meaningful judicial review to vindicate their constitutional rights.

Retroactively applying Executive Order No. 12,846 would further offend the prohibitions against *ex post facto* laws and bills of attainder in U.S. Const. Art. I, § 9, cl. 3. Under 50 U.S.C. § 1705(b) and under § 585.701 of OFAC's Federal Republic of Yugoslavia (Serbia and

Montenegro) Sanctions Regulations published at 58 Fed. Reg. 13,199, 13,212 (1993), petitioners are subject to criminal penalties (including fines, imprisonment, or both) if they willfully violate any order or regulation issued under the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-1706. Applying the latest executive order to moot this writ petition and to justify the prior unlawful blockings would constitute an *ex post facto* violation by specifically targeting and punishing petitioners and their vessels for past lawful conduct. If applied to petitioners, the latest executive order would retrospectively criminalize a status and events occurring before its enactment, would disadvantage petitioners by punishing them now for earlier lawful acts beyond the scope of the earlier executive orders, and would change the legal consequences of their prior status. *See Collins v. Youngblood*, 497 U.S. 37 (1990); *Miller v. Florida*, 482 U.S. 423 (1987). A retroactive application of Executive Order No. 12,846 would also be a prohibited bill of attainder by inflicting punishment upon petitioners as an identifiable group and confiscating their property without a judicial trial because of their prior status. *See Nixon v. Administrator of General Services*, 433 U.S. 425 (1977); *United States v. Brown*, 381 U.S. 437 (1965). This writ petition is by no means moot.

CONCLUSION

As discussed above and in the petition, this case presents questions of extreme importance. The decisions below upholding OFAC's arbitrary, capricious, and unlawful blocking orders have violated petitioners' constitutional rights, the doctrine of separation of powers, and this Court's standards of judicial review of administrative decisions—particularly as set forth in *Overton Park*. This writ application presents substantial and important reasons for granting certiorari within the meaning of Rule 10.1(a) and (c) of this Court's Rules. This Court should exercise its power of supervision to correct the lower

courts' departure "from the accepted and usual course of judicial proceedings" and to correct the lower courts' prejudicial errors of constitutional and federal statutory law. Unless corrected, OFAC now has license to adopt arbitrary presumptions and deprive citizens of their property at the whim of its administrator. Unless this Court intercedes, this fundamental error will be repeated and evade review in the many future cases when economic sanctions are imposed against foreign governments and the rights of innocent non-governmental entities and persons are jeopardized.

This Court has never hesitated to stop governmental overreaching that infringes on the rights of individuals. This case is the perfect vehicle for this Court to address broad concerns of judicial review and separation of powers with a worldwide impact. More particularly, this Court should grant certiorari to reverse OFAC's unlawful actions that have irreparably injured these petitioners and will continue to do so by unjustly stigmatizing them as entities of a foreign government that in due course may face substantial claims from other citizens and governments. Unless reversed, the administrative and judicial rulings at issue will forever deprive petitioners of their property and may ultimately destroy them. This case warrants this Court's review.

Respectfully submitted,

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